STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 14-93:

FLORENCE-CARLTON CLASSIFIED EMPLOYEES ASSOCIATION, NEA/NEA,	)	
Complainant,	)	
- vs -	)	
FLORENCE-CARLTON HIGH SCHOOL AND ELEMENTARY DISTRICT NO. 15-6, RAVALLI COUNTY, MONTANA,	)	FINAL ORDER
Defendant.	)	

* *

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by James L. Keil, Hearing Examiner, on September 15, 1993.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order was filed by Don K. Klepper, Ph.D., on behalf of the Defendant/Complainant on October 8, 1993.

Oral arguments were scheduled before the Board of Personnel Appeals on Wednesday, November 17, 1993.

After reviewing the record and considering the briefs and oral arguments, the Board concludes as follows:

1. The Hearings Examiner's findings of fact are supported by substantial evidence and are, therefore, approved and adopted.

2. The phrase "changing her hours while in the District's employ" found at line 19, on page 9 of conclusion of law #5 is not legally correct and is hereby revoked and vacated. In substitution of the aforementioned phrase, the Board substitutes the following language: "transfer of her bargaining unit work to a non-bargaining unit position" which the Board concludes is both legally correct and supported by substantial evidence.

3. Subject to the above amendment, the Hearing Examiner's conclusions of law are legally correct and are, therefore, approved and adopted.

4. The phrase "changes in hours of work by paying her a sum of money in the form of wages equal to the difference of hours usually worked prior to the changes in hours and after such changes were enacted" commencing at line 6 of page 11 of the second paragraph of the recommended order is hereby deleted. In its place the Board substitutes the phrase "transfer of bargaining unit work to a non-bargaining unit position, by paying her a sum of money in the form of wages equal to the difference of hours usually worked prior to the aforementioned transfer of duties and after such transfer was enacted."

Based upon the foregoing conclusions the Board orders as follows:

IT IS ORDERED that the Defendant's Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order are hereby denied.

IT IS FURTHER ORDERED that this Board adopts the Findings of Fact; Conclusions of Law; and Recommended Order as herein amended as the Final Order of this Board.

DATED this 2nd day of December, 1993.

BOARD OF PERSONNEL APPEALS

By W. M. McKeon
WILLIS M. MCKEON
CHAIRMAN

Board members Henry and Schneider concur.

Board members Talcott dissented.

* *

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

* *

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 1st day of December, 1993:

DR. ERNEST JEAN, SUPERINTENDENT
Florence-Carlton High School and
Elementary School Districts No. 15-6
5602 Old Hiway 93
Florence, MT 59833

KARL J. ENGLUND
Attorney for Complainant
401 North Washington Street
P.O. Box 8142
Missoula, MT 59807

* *

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 14-93:

FLORENCE-CARLTON CLASSIFIED EMPLOYEES ASSOCIATION, NEA/MEA, Complainant, v. FLORENCE-CARLTON HIGH SCHOOL AND ELEMENTARY DISTRICT NO. 15-6, RAVALLI COUNTY, MONTANA, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

I. INTRODUCTION

The formal hearing in the above-referenced matter was conducted on March 10, 1993, in Helena, Montana. Following submission of initial and reply post-hearing briefs, the matter was considered submitted for decision effective April 20, 1993. The hearing was conducted under authority of § 39-71-406, MCA, and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, MCA.

Complainant, Florence-Carlton Classified Employees Association, NEA/MEA (hereinafter referred to as "Association"), was represented by counsel Karl Englund. Defendant, Florence-Carlton High School and Elementary School District No. 15-6 (hereinafter referred to as "Defendant"), was represented by Don Klepper, Ph.D. Sworn testimony was provided by Sarah Perry, Food Service Worker; Sandy Bushek, Uniserve Director, MEA, Missoula Office; and Dr. Earnest Jean, Superintendent, Florence-Carlton School District.

Association's exhibits (Exh.) 2 through 8 and Defendant's Exhs. A through D were admitted into the record by stipulation. Association's Exh. 1 was withdrawn.

II. ISSUE

The issue to be decided in this matter is whether Defendant violated § 39-31-401(1) and (5), Montana Code Annotated (MCA), of the Collective Bargaining for Public Employees Act, in transferring certain work previously performed by bargaining unit member Sarah Perry to a non-union supervisor, thus reducing the number of hours worked.

III. FINDINGS OF FACT[1]

1. The defendant and the association have been parties to a series of collective bargaining agreements covering all classified employees of the district, excluding supervisors, Secretary to the superintendent, and temporary, casual and substitute employees. Included in the unit are lunchroom helpers and food service employees. (Testimony of Ms. Bushek; Exh. 2--p. 2)

2. The most recent collective bargaining agreement covering classified employees of Defendant's district covers the term July 1, 1992, to June 30, 1994. The agreement was concluded on July 23, 1992, but the contract was not signed until December of 1992. (Testimony of Ms. Bushek; Exh. 2)

---

[1]All proposed findings, conclusions and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions may have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

3. Defendant provides a hot lunch program for which it contracts with Missoula School District No. 1. The lunches are prepared at the University of Montana (U of M) and must daily be transported from the U of M campus to Defendant schools. (Testimony of Dr. Jean)

4. It is the responsibility of the defendant to administer and supervise the hot lunch program to ensure compliance with Federal and state guidelines. (Testimony of Dr. Jean)

5. Prior to the 1992-1993 school year, the hot lunch program was under the general supervision of the District Clerk. (Testimony of Dr. Jean)

6. Sarah Perry (hereinafter referred to as "Perry") was hired by Defendant in December 1985 as a Food Service Worker/Driver (FSW/D), a position included in the classified employee bargaining unit. She was one of two FSW/Ds working for Defendant. Her duties at that time included driving Defendant's van to the U of M campus to pick up the food, monitoring the food quantity and quality (with the duty and right of refusal if the food was not the proper temperature and/or portions), set-up, serving and clean-up. She initially worked 5½ hours per day, 5 days per week (27½ hours per week). (Testimony of Perry and Ms. Bushek)

7. Prior to working for Defendant, Perry was employed as a food service worker for a state hospital in California where she was a lead worker and substituted in her supervisor's absence. (Testimony of Perry)

8. In 1987, Perry's hours were increased to 6 hours per day (30 hours per week) when she began doing more clean-up work. (Testimony of Perry)

9. In 1989, Perry's hours were increased to 6½ hours per day (32½ hours per week) when the other FSW/D was laid off. She also was assigned the addition duties of ordering and picking up à la carte supplies, running errands for the school office, and orienting new food service workers. (Testimony of Perry)

10. In July of 1992, Defendant reorganized the hot lunch program in order to gain more control and accountability, the need for which was also voiced by some food service employees who felt the need for an on-site supervisor. (Testimony of Dr. Jean) To this end, the position of Hot Lunch Supervisor/Driver was created. The position vacancy was posted July 29, 1992, and read, as follows:

> The Board of Trustees has opened a position for hot lunch supervisor/driver. This may mean, depending upon who is hired for this position, a shift in your duties and responsibilities. Enclosed is the advertisement for that position.

The advertisement read, in pertinent part, as follows:

> HOT LUNCH SUPERVISOR-SATELLITE KITCHEN PROGRAM
>
> Duties include: Driving lunch van, managing hot lunch program, supervising five employees. Applicant must have ability to lift 50 lbs and move heavy carts regularly. $6.00 hr/minimum, 7 hours, 182-day year, August-June. Deadline for application is August 17, 1992.

(Exhs. 3--p. 2 and 4--pp. 1-2) In addition to the posted qualifications and duties, the incumbent is required to manage the financial matters of the hot lunch program, including preparation of the overall program budget, to evaluate employees and to make recommendations with regard to hiring and termination. (Testimony of Dr. Jean)

11. Perry's driving, quality control, supply ordering and lead worker/supervision duties were removed from her and

transferred to the new Hot Lunch Supervisor/Driver position. (Testimony of Dr. Jean and Perry) As a result, as of September 8, 1992, Perry's work schedule was reduced to 4 hours per day (20 hours per week). (Testimony of Perry)

12. The position of Supervisor/Driver is not included in the bargaining unit. (Testimony of Dr. Jean and Ms. Bushek)

13. The association was not consulted or advised in any way concerning the creation of the position of Hot Lunch Supervisor/Driver, nor was it advised of the transfer of bargaining unit work to the non-bargaining unit position. (Testimony of Ms. Bushek and Dr. Jean)

14. Perry applied for the position of Hot Lunch Supervisor/Driver but was not selected for an interview. (Testimony of Perry) It was the determination of Defendant that Perry was not qualified for the Hot Lunch Supervisor/Driver position. (Testimony of Dr. Jean)

15. As of March 10, 1993, the Hot Lunch Supervisor/Driver position was held by Mr. Tom Dreyer, who possesses a Bachelor of Science degree in Hotel/Restaurant Management and had 2 years practical experience. (Testimony of Dr. Jean; Exh. 5--p. 2)

16. Around the end of September or the first part of October 1992, Perry's hours were further reduced to 3½ hours per day (17½ hours per week). (Testimony of Perry)

17. Defendant offered and Perry accepted a temporary part-time assignment as a Janitor, beginning in October of 1992, in addition to her FSW/D position. As a janitor, she worked one 8-hour Monday afternoon-evening shift each week. Her combined hours then totalled 25½ per week. (Testimony of Perry) The temporary

part-time janitor assignment was offered in part to assuage Perry for the loss of hours. (Testimony of Dr. Jean) Perry was not interested in a full-time position due to family considerations. (Testimony of Perry)

18. Effective February 1, 1993, Perry's FSW/D hours were reduced again to 2½ hours per week and she was relieved of her janitorial duties, the effect of which was to reduce her work hours to 12½ per week. The Defendant's fiscal situation was cited as the reason for this change. (Testimony of Perry; Exh. 7--pp. 1-2)

19. Defendant never notified the association its decisions to increase or reduce Perry's work hours. (Testimony of Ms. Bushek and Dr. Jean)

20. There is no provision in the bargaining agreement contract which prohibits the Defendant from reducing the number of hours worked by a classified employee. (Exh. 2) Perry was never led to believe she was guaranteed a minimum number of hours of work. (Testimony of Perry) The number of work hours of food service employees is contingent on the student enrollment, the actual number of which cannot be accurately determined until the first day of each school year. (Testimony of Dr. Jean)

21. As a result of Perry's loss of hours, Defendant reduced its share of contribution to Perry's employment health policy from $145.00 per month to $0 per month in September of 1992 and--following the filing by Perry of a grievance--in October of 1992 insurance contributions were reinstated at the prorated amount of $92.80 per month. (Testimony of Perry; Exh. 8) Defendant continued premium contributions despite the fact Perry did not work enough hours to qualify. (Testimony of Perry)

22. Perry served as a recruiter for the association, served as Membership Chair and was a negotiating team member for the 1992-1994 contract. (Testimony of Perry)

23. Since 1988, Perry has "almost yearly" filed grievances against Defendant through the association or the association had to intervene in other ways on behalf of Perry. (Testimony of Ms. Bushek)

24. The Classified Personnel Salary Schedule has not been modified to reflect the change in Perry's job duties. It still reads "Food Service/Drivers." (Exh. 2--p. 18)

IV. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this matter pursuant to § 39-31-405, Montana Code Annotated (MCA).

2. The association charges that Defendant violated § 39-31-401(1) and (5), MCA. That statute, in pertinent part, reads as follows:

> It is an unfair labor practice for a public employer to:
>
> (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;
>
> . . . ; or
>
> (5) refuse to bargain collectively in good faith with an exclusive representative.

Section 39-31-201, MCA, as referred to in Subparagraph (1) above, reads as follows:

> Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in

other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.

3. The association argues that the defendant's decision to transfer work from Perry to the new supervisory position affected her hours of employment and other terms and conditions of her employment, specifically gross wages and employer insurance contributions, and, further, interfered with her free exercise of employee rights in retaliation for her union membership and activities. Defendant responds that the absorption of many of Perry's duties into the new supervisory position was required by federal codes to provide for fiscal and organizational management and accountability in the inspection of food being distributed to students; and further, that Perry has no property interest in her FSW/D position, and therefore could be terminated at will since there was no contractually specified term of employment.

4. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and National Labor Relations Board (NLRB) precedence as guidelines interpreting the Montana Collective Bargaining for Public Employees Act as the State Act is so similar to the Federal Labor Management Relations Act. State ex rel Board of Personnel Appeals v. District Court and Teamsters Local No. 445 v. State ex rel Board of Personnel Appeals v. District Court, 183 Mont 223, 598 P.2d 1117, 103 LRRM 2297 (1979); Teamsters Local No. 45 v. State ex rel Board of Personnel Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); City of Great Falls v. Young (III), 686 P.2d 185, 199 LRRM 2682 (1984). It is among such precedents that is found that the basic, fundamental purpose of labor relations is the good faith

negotiation of the mandatory subjects of bargaining--wages, hours, and other terms and conditions of employment. Unilateral changes by an employer during the course of a collective bargaining relationship concerning mandatory subject matter of bargaining is considered a violation of law. NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962). The U.S. Supreme Court has further held that,

> The particular hours of the day and the particular days of the week during which employees may be required to work are subjects well within the realm of wages, hours, and other terms and conditions of employment about which employers and unions must bargain.

(Emphasis added.) Meat Cutters v. Jewel Tea Co., 381 US 676, 691, 59 LRRM 2376 (1965). Even unilaterally changing hours for a one-week period is considered a denial of a union's opportunity to bargain. Florida Steel Corp., 601 F2d 125, 101 LRRM 2671 (CA 4, 1979). This is also true where an employer unilaterally changes the hours of work to the advantage of the employee(s). American Oil Co., 602 F2d 184, 101 LRRM 2981 (CA 8, 1979).

5. Defendant's argument with regard to Perry's status as an "at will" employee is persuasive although misplaced. While Perry may very well be subject to termination, changing her hours while in the district's employ remains the domain of collective bargaining. In consideration of cited precedents, it can only be concluded that the historical changes in Perry's hours denied the association's opportunity and right to bargain--when hours were being added, and, especially, when they were being taken away.

The association does not argue against Defendant's right to create a supervisory position to oversee and manage the hot lunch program, but it does take exception to the transfer of Perry's duties to that position, which is excluded from the unit pursuant

to the bargaining agreement. When the impact of a change in bargaining unit work is significant, it constitutes a change in the terms of employment and, thus, is subject to collective bargaining. It is concluded the change in Perry's duties was significant as evidenced by the major reduction in her work schedule--4 hours per day. Based on the above discussion, the conclusion is that Defendant violated the provisions of § 39-31-401(5), MCA.

6. The association also charges that Defendant attempted to interfere, restrain and/or coerce Perry in the exercise of her rights. Section 39-31-401(1), MCA. In that charge it is alleged the defendant's reduction of Perry's hours and benefits was a calculated move to send a message to other union members that any attempt to enforce their rights under the bargaining agreement would result in similar punishment. It cites Perry's active involvement in the union as a member, officer and negotiator, and her frequent utilization of the grievance procedure and other union interventions on her behalf. The facts in the record, however, do not support this argument.

Perry first sought union intervention in 1988, yet in 1989 her hours were increased from 6 to 6½ per day. She was allowed to continue this hour work schedule until the beginning of the 1992-1993 school year when the position of Hot Lunch Supervisor/Driver was created and filled. The impact this had on Perry's wages and benefits was recognized by Defendant which prompted the offer to her of the temporary janitorial position. It is concluded from this that there was no violation of § 39-31-401(1), MCA.

V. RECOMMENDED ORDER

1. IT IS ORDERED that the defendant cease and desist from refusing or failing to bargain collectively in good faith with the association as to hours of work.

2. IT IS FURTHER ORDERED that the defendant make whole Sarah Perry who was affected by the unilateral changes in hours of work by paying her a sum of money in the form of wages equal to the difference of hours usually worked prior to the changes in hours and after such changes were enacted. The calculation of such back-pay will be performed in cooperation with and in agreement with the association. If no agreement on the amount of back-pay award can be reached between the parties within thirty (30) days of this Order, a hearing will be conducted by the Board of Personnel Appeals to determine such amount.

VI. NOTICE

In accordance with Board's Rule ARM 24.25.107(2), the above RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless written exceptions are filed within twenty (20) days after service of this Order. The notice of appeal shall consist of a written appeal of the decision of the hearing officer, must set forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal is to be mailed to: Administrator, Employment Relations Division, Department of Labor and Industry, P.O. Box 1728, Helena, MT 59624-1728.

Dated this 15th day of September, 1993.

BOARD OF PERSONNEL APPEALS

JAMES L. KEIL
Hearing Examiner